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argument

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 FRANCISCO GARCIA TAMAYO, *et*
4 *al.*,

Plaintiffs,

New York, N.Y.

5 v.

14 Civ. 9633 (GBD)

6 DHR RESTAURANT CO., LLC, *et*
7 *al.*,

8 Defendants.

9 -----x

10 SEPTEMBER 6, 2016
11 11:25 a.m.

12 Before:

13 HON. GEORGE B. DANIELS,

14 District Judge

15 APPEARANCES

16
17 JOSEPH & NORINSBERG, LLC
Attorneys for Plaintiffs

18 BY: JON L. NORINSBERG
19 BENNITTA L. JOSEPH
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20 DAVIS & GILBERT, LLP
Attorneys for Defendants

21 BY: GUY R. COHEN

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(Case called)

MR. NORINSBERG: Jon Norinsberg on behalf of plaintiffs from Joseph & Norinsberg. Good morning, your Honor.

MS. GOURARIE: Chaya Gourarie on behalf of the plaintiffs from Joseph & Norinsberg.

MS. JOSEPH: Bennitta Joseph on behalf of plaintiffs from Joseph & Norinsberg. Good morning, your Honor.

MR. COHEN: Guy Cohen, Davis & Gilbert, on behalf of the defendants.

THE COURT: Good morning, Mr. Cohen.

MR. COHEN: Good morning.

THE COURT: Mr. Cohen, let me hear you with regard to your motion.

MR. COHEN: Thank you, your Honor.

Your Honor, as set forth in detail in defendant's summary judgment motion, Rare runs a bustling, hectic restaurant and catering operation, operates 17 hours a day at two very busy New York City hotels. The plaintiffs served as the head chefs of these restaurants and they managed all aspects of the day-to-day operations of the kitchens that they oversaw on a day-to-day basis. As I will lay out in greater detail and as set forth in the papers, they were managerial employees and as a result they are exempt from the overtime provisions of both the Fair Labor Standards Act and the New York Labor Law under the executive exemption.

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1 There are four provisions, four prongs to the
2 executive exemption that Rare is required to establish but only
3 two of them are at issue here so I will turn to them actually
4 for convenience in reverse order, and the first one relates to
5 employment decisions.

6 Under the executive exemption, the fourth prong
7 requires Rare, the defendant, to establish either that the
8 plaintiffs -- the head chefs -- had the authority to hire or
9 fire employees or that their suggestions and recommendations as
10 to hiring, firing, advancement, promotion or any other change
11 of status of other employees is given particular weight.
12 That's the language of the provisions. And the law is crystal
13 clear that suggestions can be deemed or considered to have been
14 given particular weight even if there is a higher authority,
15 higher supervisor that has to approve them. And so, it is our
16 position, it is Rare's position that these head chefs in fact
17 had the authority to hire and fire. However, that's not
18 necessary to be established for purposes of this motion. All
19 that's necessary to establish is that their suggestions were
20 given particular weight. And the undisputed evidence
21 establishes, at a bare minimum, that the executive chef gave
22 particular weight to their suggestions. And that's not just
23 about hiring, it could be about any of them. It's not just
24 hiring, it's not just promotions, it is not just raises, it is
25 not just terminations, but he gave particular weight to each

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1 and every one of those and I think it is most clearly shown
2 through the procedures that were in place and that are not in
3 dispute with respect to hiring.

4 Mr. Farciert was the head chef at the Rare Lexington
5 location and he testified and it is not in dispute that there
6 was a procedure in place and that procedure, which was used in
7 a number of instances all of which are in the record and not
8 disputed, the procedure was as follows: He would find out who
9 a potential candidate was. He would meet with that potential
10 candidate. He would determine if that potential candidate was
11 proper for whatever position they were hiring for be it working
12 the grill, making the salads, washing the dishes, and then at
13 some point he would call the head chef, the executive chef --
14 excuse me, Mr. Hernandez -- and say to the executive chef here
15 is the person who is being brought in. That person would then
16 start working at Rare without ever having even met
17 Mr. Hernandez.

18 Now, there is in fact a dispute between the parties as
19 to whether Mr. Hernandez played any role in the hiring of these
20 individuals. We would say that in fact Mr. Farciert was just
21 giving Mr. Hernandez a heads up as to who he hired but, in any
22 event, at a bare minimum, it was clear that these individuals
23 were hired and if Mr. Hernandez consented to the hiring of
24 these individuals, it is undisputed that he did so based solely
25 on the recommendations of Mr. Farciert, and therefore

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1 Mr. Farciert's suggestions were given particular weight.
2 Precisely or almost precisely the same situation applies at
3 Rare Chelsea where there was testimony both from Mr. Hernandez,
4 the executive chef, as well as testimony from three specific
5 individuals, all of whom said the same thing: They came in,
6 they had an interview with Mr. Garcia who was the head chef at
7 that location. Mr. Garcia spoke to them, they had a
8 conversation, Mr. Garcia then offered them a job. They came in
9 and began working at Rare Chelsea and they began doing that
10 without Mr. Hernandez having ever met these individuals.

11 Under those circumstances, again, we would say that
12 Mr. Hernandez didn't hire them but if he consented to it there
13 is no question and the undisputed facts show that he had to
14 have relied upon or given weight to their suggestions because
15 he never even met the individuals and was going on the
16 determinations that they made as to whether they were
17 appropriate hires.

18 It is also the case that Mr. -- that their
19 recommendations with respect to raises and promotions were
20 relied on by Mr. Hernandez. Mr. Hernandez has stated and there
21 is no testimony rebutting his statement that he relied on the
22 recommendations of Mr. Garcia and upon Mr. Farciert for
23 promotions and raises for a simple reason: They were the
24 day-to-day head chefs who had most knowledge about the
25 performance of the individuals in their respective kitchens.

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1 And the testimony is undisputed, not a single word to the
2 contrary, that Mr. Farciert twice recommended that a Benito
3 Garcia -- to my knowledge no relation to the plaintiff
4 Garcia -- on two different occasions a recommendation was made
5 that he should receive a promotion and that he should receive a
6 raise and on both occasions he received a promotion and he
7 received a raise. Entirely undisputed.

8 Similarly, with Mr. Garcia at Rare Chelsea, the
9 evidence in the record entirely undisputed that he felt an
10 individual named Tecum, who had come to work there I believe
11 initially as a dishwasher was doing a very good job, he
12 believed that he should be promoted, he believed that he
13 deserved a raise. He made that recommendation to Mr. Hernandez
14 and the individual received a raise. Again, no testimony in
15 the record contradicting any of that.

16 And then, turning to terminations, to sort of close
17 out the loop, there was a termination of an individual named
18 Minchaka. Mr. Garcia addressed the view that Mr. Minchaka was
19 arriving late too often, that at times when he arrived he even
20 arrived drunk at some point in time, and that as a result it
21 was interfering with the functioning of the restaurant,
22 particularly the morning shift which Mr. Minchaka worked and he
23 recommended that Mr. Minchaka be terminated and Mr. Minchaka
24 was terminated. And although in his declaration there is a
25 suggestion that he made no such recommendation, we have cited

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1 to the deposition testimony that very clearly states that he
2 recommended that this individual be terminated.

3 And finally, as to terminations with respect to
4 Mr. Farciert, it is also the case that Mr. Hernandez relied on
5 his recommendations. There was an individual, again a morning
6 person -- sorry, a cook who worked in the morning. A
7 recommendation was made that he be terminated for similar
8 reasons: For lateness, for not arriving on time on a regular
9 basis, and disrupting the activities of the restaurant.

10 There is a complaint throughout the papers submitted
11 by the other side that Mr. Hernandez didn't immediately
12 terminate this person and that was what apparently or what is
13 stated that Mr. Farciert wanted to do but, in fact, if you read
14 carefully the testimony or what is stated by each person, it is
15 in fact undisputed that the recommendation was made by
16 Mr. Farciert that this individual be terminated, that there was
17 an agreement, a discussion that he should be given additional
18 opportunity to do better; in addition, in the interim they
19 should try to find a replacement for him, and that within two
20 months of that those corrections did not occur and that, in
21 response to an additional discussion regarding termination,
22 Mr. Hernandez gave authority to Mr. Farciert to terminate
23 Mr. Ramirez.

24 That's a long story but at the end of the day what it
25 shows is that with respect to all of these various decisions,

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1 whether with respect to hiring, with respect to firing, all of
2 them -- and it could be just one, the opinions, the discussions
3 suggestions and recommendations -- these individuals were given
4 particular weight and there is in fact no evidence in the
5 record to the contrary.

6 Turning from that question, your Honor, to the second
7 issue here and the second issue here is whether these
8 individuals, whether their primary duty was management and in
9 addressing the question of whether the primary duty was
10 management, as an initial matter this Court need look no
11 further than the 56.1 statement that defendants submitted in
12 this case, paragraphs 27 and 118.

13 In those paragraphs the statement was made by the
14 defendants that the primary duty of these individuals was
15 supervising and managing their respective kitchens and, of
16 course, there is citations to the record, there is citation to
17 evidence to support those statements, and one would anticipate
18 or expect that in a case of this sort involving a chef it would
19 be -- pardon me use of a non-legal phrase -- a no-brainer that
20 they would deny that allegation, that they would cite to
21 admissible evidence, and they would state that, as is often the
22 case in this type of case, that cooking was the chef's primary
23 duties, that they were just perhaps cooks with fancy titles but
24 they make no such assertion, your Honor. And, in fact, they
25 don't put in any evidence at all of any kind in response. They

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1 simply make what we believe is a baseless objection that
2 somehow making a factual assertion about what a person's
3 primary duty is is improper. But, of course, that is not the
4 case, it is a very simple matter for a person to say, no,
5 that's not my primary duty, this is my primary duty. They
6 chose not to put in any evidence in response to that. That
7 factually supported statement is in the 56.1 statement and
8 therefore that constitutes an admission that this Court can
9 rely on.

10 But it is not just an admission that this Court can
11 rely on, not just some attorney error, there is a reason that
12 they didn't make that statement, that they didn't make that
13 allegation, that they didn't put in evidence, and the reason
14 they didn't is because there is clear evidence in the record,
15 both from Mr. Garcia and Mr. Hernandez, that their primary duty
16 was in fact managing and supervising.

17 Mr. Garcia, himself, testified that when
18 Mr. Hernandez, the executive chef was not present, which the
19 evidence in the record establishes was 60 percent or more of
20 his working hours, that his primary duty was in fact
21 supervising and managing the kitchen on an overall basis. And
22 Mr. Farciert, himself, testified that his primary or main
23 responsibility was to be the person in charge, the person who
24 made sure, on an overall basis, that the kitchen ran properly
25 and to do whatever was needed to be done in order to ensure

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1 that the kitchen was running properly. These are classic
2 management functions that were acknowledged and conceded in the
3 depositions of these individuals.

4 And although they both argue or try to argue that when
5 Mr. Hernandez was there they were not supervisors, in fact, if
6 you look a little more carefully at their testimony, they say
7 that they basically had the exact same functions when he wasn't
8 there, the only difference being that when Mr. Hernandez was
9 there, they didn't supervise as much because there was another
10 person there who could also supervise. But, the fact that
11 there was periodically a more senior supervisor present does
12 not change the nature of their responsibilities. And I will
13 note that throughout their responses the plaintiffs have, on
14 many occasions, not responded factually to assertions that were
15 supported in defendant's papers and another example of that was
16 we put in specifically, in paragraphs 115 to 117, the
17 allegation that their duties were the same when Mr. Hernandez
18 was there, the only difference being that you could ask a
19 question to Mr. Hernandez, there was another supervisor
20 present. But they didn't put in any factual evidence to
21 counter that. The only thing, the only evidence they put in
22 was a piece of evidence that Mr. Hernandez said, well, when I'm
23 there, when I'm in the building, I will walk around and I will
24 make sure everything is okay. The presence of another
25 supervisor there does not change their management

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1 responsibilities or their duties and responsibilities.

2 Their duties and responsibilities or their managerial
3 status is also confirmed by unrebutted testimony from their
4 co-workers. We have submitted evidence from four co-workers,
5 one of whom was a plaintiff in this case and is a friend of one
6 of the plaintiffs and three of whom work at the other location,
7 and all four of them have testified without being rebutted in
8 any fashion that it was their belief, it was their
9 understanding that these individuals were their managers, that
10 they worked in the kitchen as cooks, as dishwashers, and that
11 these were their managers and there, moreover, these
12 individuals managed everybody in the department. And so if
13 they needed a day off, if they wanted to ask for a raise, if
14 they had a work-related question, they were directed to
15 Mr. Garcia or to Mr. Farciert and that is entirely unrebutted.
16 In fact, in their responsive papers the plaintiffs, rather than
17 factually responding, as they did not on numerous occasions,
18 they merely state that the testimony of these individuals is
19 irrelevant. Well, it is not irrelevant and in fact case law
20 demonstrates that it is highly relevant how these individuals
21 are viewed by other staff members.

22 Your Honor, their status as managers, that is the fact
23 that their primary duty, their most important duty was
24 management, is really encapsulated well by the number of
25 admissions that they have made concerning the nature of Rare's

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1 operations. It is undisputed that this does not -- these are
2 substantial operations. They run 17 hours a day, there is
3 catering, there is catering on the roof deck, there is catering
4 in the hotel rooms, banquet halls and conference halls. there
5 is additional service done on the rooftops. These are large
6 restaurants and all of this work, often that the events have as
7 many as 150, 200 people and they -- the plaintiffs do not
8 dispute any of this. They acknowledge that Rare is a
9 significant, substantial operation and that in order to manage
10 it you need to have an individual who is working and who is
11 juggling all of the day-to-day responsibilities of such a
12 large, complex, hectic operation and it is not in dispute that
13 their duties and responsibilities, as the head chefs included
14 during the inventory and making sure that everything was
15 purchased on a regular basis. No small matter for a company of
16 Rare's volume where they've purchased \$10,000 to \$20,000 worth
17 of food a week and they have to continually -- the job of the
18 manager is to go through, to see what is spoiled, to see what
19 is not spoiled and make sure everything is there, to prep all
20 of the items on a day-to-day basis that need to be -- that need
21 to be cooked and used for the catering operations and
22 restaurant operations of the day, to juggle which particular
23 item is done at which particular time and in that regard they
24 serve the head chefs, as expeditors, and in their papers they
25 try to make it sound like, well, what is an expeditor? You

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1 just do the orders in the order in which they're received but
2 that is a mischaracterization and an inaccurate
3 characterization. An expediter, which is undisputed that they
4 do, their job is to use their discretion, day in and day out.
5 If you have a large party, if you have a number -- if somebody
6 orders appetizers, what do you put on when? Do you start by
7 putting on the appetizers? You want to make sure everything
8 comes out at the same time. You want to make sure that while
9 you are working through this busy operation that you are not
10 setting aside or not failing to do all of the catering work
11 that needs to be done concurrently. They have to make sure
12 that all of the takeout orders are done and expedited in the
13 right fashion, that if a person comes in and doesn't like a
14 particular order that it is redone.

15 All of these -- all of these different activities are
16 activities that they do on a day-to-day basis, they require the
17 routine exercise of discretion, and because of the size of the
18 operation it really shows that this case is far different from
19 some of the cases that are cited

20 This is not the corner pub where the cook just said,
21 hey, I'm back there flipping burgers. It is simply not the
22 case. Nor is this the type of case where a person can say,
23 well, I didn't have any managerial authority. They acknowledge
24 that they do.

25 Turning a little more to their specific functions,

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1 none of which are in dispute in the record --

2 THE COURT: I am going to have to limit your time to
3 another few minutes because I am going to have to leave at
4 about noon so I want to give them an opportunity.

5 MR. COHEN: I will move it quickly.

6 They handle all sorts of classic management functions,
7 the ones I have already described.

8 THE COURT: I have read all of that.

9 MR. COHEN: In addition to all of those, they were
10 ensuring that all the training was done, they would provide
11 performance reports to Mr. Hernandez, they would work days off
12 or days on on a particular day. So, all of that are classic
13 management functions. And then we turn to supervision of
14 employees.

15 They supervise not one, not two, not three, 15 to 18
16 employees on a regular basis. Not in dispute, your Honor. The
17 person working the grill, the person working the sautee, the
18 potatoes, all of those different jobs, the job of the head chef
19 was to supervise them. The chef was required to get all the
20 inventory. All of these things being put together.

21 And so, when you ask yourself what is the most
22 important function, most primary function of management, well,
23 you would ask yourself, well, what else was it? Was it
24 cooking? Because there is no allegation that they were cooking
25 most of the time. In fact, there is not an allegation that

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1 they were cooking, say, 25 to 30 percent of the time or less
2 and in the case of Mr. Farciert it appears that he wasn't even
3 cooking even more than a day a week, even according to his own
4 testimony.

5 So, let me just stress a few of the points that were
6 made by the other side. There is a new argument made out of
7 nowhere. As the Court can imagine, when you take a deposition
8 you want to find out what somebody's duties and
9 responsibilities were and Mr. Farciert was clearly asked the
10 question: Did your duties and responsibilities ever change?
11 And he said no. And I said, just to be clear, to the best of
12 your recollection you had the same job, same duty throughout
13 your time at the company? Yes, absolutely. The rest of the
14 deposition is addressing all of those supervisor functions.

15 Well, now with a little bit of fear about summary
16 judgment, suddenly Mr. Farciert submits an affidavit where he
17 said, oh wait, changed my mind. For the first year I was
18 working there I was just a sous chef, I was just getting
19 trained to be a cook. Completely out of the blue, completely
20 contradicts his testimony, and of course case law is clear that
21 on summary judgment he can't submit an affidavit that
22 contradicts your deposition testimony. And in that he tries to
23 say, well, I cook six hours, eight hours a day. And that's a
24 completely new testimony, completely revised testimony.

25 Similarly, in a further effort to, I would say, to try

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1 to salvage Mr. Farciert's case, they have submitted an
2 affidavit from a Mr. Velez, and in that affidavit Mr. Velez
3 says, well, I saw him working eight hours a week for the first
4 year that I was there.

5 Well, we were very clear -- Mr. Norinsberg and I in
6 fact had a very good relationship throughout this case -- and
7 they handed us initial disclosures: Identify a number of
8 people. And I made very clear it was my intention to depose
9 anybody on that list that they intended to put in testimony
10 from. And, in fact, Mr. Norinsberg and I had a discussion in
11 which he specifically said, okay, I'm not going to use this
12 guy, I'm not going to use that guy but I do intend to use that
13 guy. And I deposed the exact guys that he said he was going to
14 use. So, we always had a very good relationship and that
15 hasn't changed but I will say that that affidavit is entirely
16 inappropriate and should be barred because the witness was not
17 identified during discovery, not identified in their initial
18 disclosures.

19 A few additional points.

20 An argument is made that they haven't shown how much
21 time, or we haven't shown how much time the plaintiffs spent on
22 management. Well, it is not so. The argument and the position
23 is that they were spending 90 percent or more of their time on
24 management because if they were working on a grill or they're
25 working doing anything else, they're still supervising at the

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1 same time. And they don't dispute that. They don't dispute
2 the many cases that say that you can in fact be exempt even if
3 you are performing certain non-exempt functions like cooking
4 and supervising at the same time. Instead they say, well,
5 there were times when I was working really hard, it was so busy
6 I worked from 8:00 to 12:00 and so busy I didn't have time to
7 do anything else.

8 Well, the question is not whether you had time to do
9 it, it is a question of what your responsibilities are. And
10 so, a perfect example is Mr. Garcia, who testified that he had
11 to cover for a cook from 8:00 to 12:00 in the morning and it
12 was very, very busy. Well, that might be true but it doesn't
13 change that his responsibilities, which are undisputed at the
14 very same time in the morning, what happens? He is supervising
15 the prep people who are making the patties, who are cutting the
16 vegetables, he is supervising the intake of everything that
17 comes in during the day. And there is no dispute that those
18 were still his management responsibilities while he was doing
19 the cooking.

20 And in that way, your Honor, this case is very
21 different from some of the other cases to which they cite
22 because in some cases, the testimony of the individual is that
23 I was a cook, I didn't have any managerial responsibilities, or
24 in one case the woman testified when I was working making the
25 sandwiches, all I was doing was working making the sandwiches.

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1 I had no other duties and responsibilities. That is not their
2 testimony and that is not the fact of it. The fact is whenever
3 they were working and whenever they were cooking, which was not
4 a significant percentage of the time from what we can gather
5 and was in the record, they were still supervising at the same
6 time and they have not challenged that at all.

7 Finally, they repeat a mantra over and over again. I
8 didn't have any independent authority, I had to run everything
9 by Mr. Hernandez, but it is stated in these broad general
10 abstract terms and that when you actually delve into the record
11 itself what you see is that they did have authority, they
12 exercised discretion in innumerable ways from directing
13 individuals to work on a particular assignment, tell the grill
14 guy to go make a salad because we're busy. Tell somebody to
15 make a cheese plate because we have to send it upstairs.

16 The fact is everybody in that kitchen had particular
17 jobs so when you boil that all together, your Honor, you have
18 to ask yourself the question: What was the most important role
19 of these individuals? What was their primary role? And they
20 haven't said what it is. They certainly haven't put in any
21 evidence of it and it certainly wasn't -- cooking, there is a
22 lot of people doing the cooking, and it wasn't washing the
23 dishes, there is people who wash the dishes. But there is only
24 one person who was a hundred percent there a hundred percent of
25 the day at these two locations whose job was to make sure that

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1 all of the differing and disparate pieces of an admittedly,
2 concededly, bustling, active kitchen are happening and
3 proceeding and getting together at once. Therefore, your
4 Honor, we believe that the undisputed evidence shows that
5 management was their primary duty and, with that, and with that
6 and with the fourth prong being established, your Honor, we
7 believe based on the undisputed facts that summary judgment
8 should be granted.

9 THE COURT: Thank you.

10 Mr. Norinsberg?

11 MR. NORINSBERG: Good morning, your Honor.

12 THE COURT: Good morning.

13 MR. NORINSBERG: Your Honor, summary judgment in this
14 case should be denied. It should be denied because the
15 defendants have failed to meet their burden of proof on summary
16 judgment. They have failed to prove two essential elements of
17 the executive exemption. They have failed to prove the primary
18 duty was the plaintiff's management. And, they failed to prove
19 that hiring and firing was independent authority or that their
20 suggestions were given particular weight.

21 THE COURT: Let me start backwards because I want to
22 see whether there is really factual dispute as to certain
23 issues.

24 It seems to me from this record -- and if I am
25 misstating it you can correct me -- it seems to me from this

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1 record that over the 15 to 18 employees that were at the
2 restaurant when these two individuals were there, that those 15
3 to 18 people reported to the head chef.

4 Is that an incorrect statement?

5 MR. NORINSBERG: I think in that context that
6 hierarchy is correct but what's missing from that, Judge, is
7 the fuller context that many of the functions that the head
8 chefs were performing were interchangeable functions that a lot
9 of exempt -- a lot of the non-exempt hourly employees were also
10 performing, such as receiving orders.

11 THE COURT: No, I understand that, but I want to first
12 try to figure out who is in charge. Okay? And I think -- I'm
13 not sure that you are arguing that when the two head chefs were
14 at their locations and there were 15 to 18 other employees that
15 they were the individuals who were in charge. Everybody
16 reported to them, they supervised all of the activities of all
17 of those other employees.

18 Is that inaccurate?

19 MR. NORINSBERG: I think it is, your Honor.

20 THE COURT: To what extent is that inaccurate?

21 MR. NORINSBERG: For example, if Mr. Tamayo is
22 spending four hours in a given day at the sautee station
23 cooking, he specifically testified he is not supervising
24 people.

25 THE COURT: Who is in charge then? If somebody had a

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1 problem wouldn't they still have to go to him for a decision?

2 MR. NORINSBERG: When Edgar Hernandez is on site at
3 both of these --

4 THE COURT: Again, let's put aside that, putting aside
5 that argument talking about when Hernandez is not on site
6 because Hernandez is clearly in the hierarchy but the two head
7 chefs, Hernandez is the executive chef.

8 MR. NORINSBERG: Right.

9 THE COURT: When the executive chef is not present the
10 head chefs are in charge. Is that an incorrect statement?

11 MR. NORINSBERG: It's not that I'm saying that it is
12 incorrect, your Honor, I'm just staying that it misses maybe
13 the actual context of what was happening there.

14 THE COURT: But you are saying that wasn't their
15 primary duty.

16 MR. NORINSBERG: That's not the primary duty and there
17 is a glaring omission in the summary judgment papers that the
18 defendants made that they just gloss over as they're presenting
19 the oral argument. One of the most critical factors that has
20 to be shown is what percentage of time is delegated to the
21 managerial responsibilities versus what percentage is delegated
22 to non-managerial.

23 THE COURT: That's where I want to focus your argument
24 then.

25 MR. NORINSBERG: Okay.

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1 THE COURT: Is your argument simply that if they spent
2 a greater percentage of time doing non-managerial work?
3 Because your argument is not that they don't do managerial or
4 supervisory work.

5 MR. NORINSBERG: That's correct.

6 THE COURT: So you are saying other than saying that
7 they spent more than 50 percent of their time doing
8 non-managerial work, is there any other argument to be made
9 that they are not the ones in charge making the decisions at
10 their locations where there are head chefs when the executive
11 chef isn't available?

12 MR. NORINSBERG: If you bring the question like that I
13 have to agree with you on the way you framed it.

14 THE COURT: That's all I wanted to know.

15 MR. NORINSBERG: I want to clarify, though, that what
16 defendants do, they list a laundry list of functions that they
17 claim are managerial functions and then they boldly assert in
18 their moving papers that plaintiff clearly spend more than 50
19 percent of their time performing managerial functions or
20 greater and they do not cite to the record.

21 THE COURT: What do you say they spend over 50 percent
22 of their time doing? Cooking?

23 MR. NORINSBERG: Not just cooking, there is training,
24 expediting, receiving orders.

25 THE COURT: Aren't those managerial responsibilities?

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1 MR. NORINSBERG: No.

2 THE COURT: Why isn't training managerial?

3 MR. NORINSBERG: Because testimony in the record shows
4 that training was done by everybody at a cook station to the
5 next person. Whoever standing at a cook station is training
6 the next guy is not a managerial function; everybody did it,
7 everybody expedited orders, everybody received orders.
8 Everybody -- if there is a complaint, a managing complaint, it
9 went to the front of the house manager. No matter who it was.

10 THE COURT: I know, but the person who ultimately had
11 this discretionary decision-making authority with regard to all
12 of those decisions was the head chef, right?

13 MR. NORINSBERG: I don't agree with that because, for
14 example, if there was a complaint from a customer about a
15 complaint going on in the kitchen, it would be brought to the
16 manager front of the house, not to our guy.

17 THE COURT: But if the manager and head chef disagree,
18 the head chef's position would control, right?

19 MR. NORINSBERG: I don't agree because it could be --

20 THE COURT: Do you say that the employee could make a
21 decision adverse to what the head chef told him to do?

22 MR. NORINSBERG: No, because he didn't have the
23 authority to begin with. It would go to Edgar Hernandez. They
24 couldn't discipline.

25 THE COURT: Edgar Hernandez, what part of the time are

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argument

1 you saying Edgar Hernandez was available to make the decisions
2 for them?

3 MR. NORINSBERG: According to my client's testimony he
4 was there 90 percent of the time of the first year of the
5 operation.

6 THE COURT: He couldn't be in two locations 90 percent
7 of the time. It is impossible.

8 MR. NORINSBERG: The second location didn't exist in
9 the first year from 2009 to 2010.

10 THE COURT: So, in the first year, okay, so what
11 about --

12 MR. NORINSBERG: 90 percent of the time.

13 THE COURT: What about after the first year?

14 MR. NORINSBERG: I just want to step back for one
15 second, your Honor.

16 This is what I feel like is being lost in this
17 discussion here. They had a burden of proof because they're
18 the employer.

19 THE COURT: Right.

20 MR. NORINSBERG: They never cited the applicable
21 standard which is they have to show plainly and unmistakably --
22 that's an exact quote -- Second Circuit, Supreme Court, they
23 never cited anywhere in their brief or acknowledged that that's
24 the actual standard.

25 THE COURT: They do say that. We are not disputing

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argument

1 the standard. The standard is whether they make employment
2 decisions or their primary duty was managing. Those are the
3 two things at issue.

4 MR. NORINSBERG: But it has to be both plain and
5 unmistakably clear on the record according to the Second
6 Circuit on *Mullins v. City of New York* which cites the Supreme
7 Court. They never met the burden in the original motion
8 because they never actually showed various factors that the
9 Courts actually look at, not just the relative time which, by
10 the way, Judge, they never spoke about the time until the reply
11 brief and all of a sudden Hernandez, for the first time ever
12 says, oh, they were only cooing 25 to 30 percent of the time.
13 But they're the movant. At summary judgment they should have
14 cited to the record if there was any record about that.

15 THE COURT: Okay. Let's say I will -- and that's
16 where I will look. I will look and see if the record indicates
17 that more than 50 percent of the time they were engaged in
18 managerial functions rather than functions otherwise.

19 MR. NORINSBERG: Okay.

20 THE COURT: But, other than that --

21 MR. NORINSBERG: There is more.

22 THE COURT: I know, but other than that, when
23 Hernandez is not around these are the people that everybody
24 else reported to, isn't it? These two head chefs. Every
25 reported to the head chef; is that correct?

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argument

1 MR. NORINSBERG: I guess, Judge, if we were to talk in
2 a theoretical sense --

3 THE COURT: I'm talking in a real sense.

4 MR. NORINSBERG: I don't think the actual testimony
5 bears that out.

6 THE COURT: Who do they report to?

7 MR. NORINSBERG: They weren't reporting, it is an
8 assembly line of people working.

9 THE COURT: Who is in charge?

10 MR. NORINSBERG: There is no one person there.

11 THE COURT: You are saying to me the head chef does
12 not have the responsibility to tell the other individuals what
13 their job responsibilities are while they're there?

14 MR. NORINSBERG: I wouldn't go that far. What I would
15 say is if you actually consider the testimony in the record,
16 they were doing so many -- they, meaning the head chefs -- were
17 doing so many non-managerial functions --

18 THE COURT: That's the other argument, that's the 50
19 percent argument. I'm not talking about that. I am asking you
20 specifically, even if they were spending -- because I want to
21 put that issue aside if I can put it aside. Even if your
22 argument is that 90 percent of the time they were doing
23 non-managerial functions it is clear that the other period of
24 time, that 10 percent, they were engaged in managerial
25 functions.

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argument

1 MR. NORINSBERG: I will give you that, your Honor.

2 THE COURT: And no one else had the authority, no one
3 else on the scene had the authority that the head chefs had
4 above the head chefs or equal to the head chefs other than
5 Hernandez who was the executive chef.

6 Is that an accurate statement?

7 MR. NORINSBERG: I will give you that too, Judge.

8 THE COURT: Okay.

9 MR. NORINSBERG: But the question is, on this record,
10 let's say that. If they did that 10 percent of the time that
11 was true. As a matter of law that would blow out their summary
12 judgment motion.

13 THE COURT: You are saying that was their duty and no
14 one else had that duty above them other than Hernandez and they
15 served that function and there is nobody else who -- when they
16 were on the scene, there was nobody else this record could
17 point to who served the function other than the head chef.

18 MR. NORINSBERG: I would agree but, keep in mind, even
19 when they're the top person on the scene, even in that
20 scenario, they're implementing and following the express
21 directives of the executive chef. He had explicit rules, he
22 had procedures.

23 THE COURT: That's true of any managerial hierarchy.
24 You are subject to the decisions of those who are above you.
25 Isn't that true? I mean, those people who work for Bill Gates,

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argument

1 just because they're the vice president, they have to do what
2 Bill Gates wants them to do. That doesn't make them a
3 non-managerial employee.

4 MR. NORINSBERG: Right, but one of the factors, one of
5 the most important factors on primary duty is whether there is
6 a complete freedom from direct supervision and the defendant
7 failed establish that because the testimony is very clear,
8 there were express directives, there were required procedures,
9 schedules, assembly line, cleaning, all types of things. These
10 weren't things that our plaintiffs created, these were policies
11 that Hernandez created.

12 THE COURT: But policies don't matter. It is not
13 policies, it is who implements those policies on behalf of
14 management, isn't it? That's really the key.

15 MR. NORINSBERG: But if we are looking at the way, we
16 are only trying to look at the analysis that we see in the
17 Second Circuit and a lot of the cases defendants cite are out
18 of the Second Circuit. We are going by this Circuit. This
19 Circuit says that's an important factor. Look at what they're
20 actually doing, whether they're actually policy-making or
21 whether they're following directives.

22 THE COURT: Tell me what it is that you say they could
23 not have the done when they were on the job as head chef unless
24 they picked up the phone and called Hernandez and it was
25 Hernandez made that decision. Give me an example.

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argument

1 MR. NORINSBERG: They could not discipline somebody.
2 Both plaintiffs testified that if --

3 THE COURT: Forget about dealing with the employees,
4 the employment decisions. I'm talking about their primary duty
5 in terms of making sure that the restaurant ran appropriate.
6 Is there any decision that they -- discretionary decision they
7 could not make on their own if they were there and Hernandez
8 wasn't there? You are not saying they had to call up Hernandez
9 every time they wanted to make a decision?

10 MR. NORINSBERG: No. Specifically with firing,
11 absolutely they couldn't do it. Disciplining absolutely
12 couldn't do.

13 THE COURT: I'm not talking about employment
14 decisions, I'm talking about primary duty of managing the
15 place. In terms of primary duty of managing the place.

16 MR. NORINSBERG: I would agree with you on a
17 day-to-day basis I don't think on every single decision they
18 have to call Hernandez up but they do not --

19 THE COURT: Tell me what kind of decision, managerial
20 decision other than personnel decision, that they would have to
21 call Hernandez up for.

22 MR. NORINSBERG: I'm not sure that the record
23 indicates one way or the other whether there were other
24 decisions like that but things they were doing were being done
25 by everyone. That's our overriding point.

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argument

1 THE COURT: Well, the things they were doing wasn't
2 being done by everyone. That's not the argument you made. If
3 they told a person this is your assignment for that day, that's
4 not what everybody, all 15 of the people could make that
5 decision. That's a management discretionary decision.

6 MR. NORINSBERG: Right, but --

7 THE COURT: If the person said I want you to cover
8 these tables, I mean, that's -- I guess that's not a cook, a
9 chef issue. Maybe it is a chef issue. But, if the chef says,
10 look. Today we are going to do X. I want you to do X. There
11 is not some other employee there who can override that
12 decision.

13 MR. NORINSBERG: But, Judge, I understand exactly what
14 you are saying but that almost completely disregards what the
15 burden was on this motion. It is simply talking about in the
16 abstract, yes, in that context they are a top dog on that but
17 what about their burden on the motion? They failed on this
18 motion because they haven't met the burden. They deliberately
19 left out the question -- I will give you an example. He was
20 questioning Mr. Farciert and he said -- counsel said to
21 Mr. Farciert: You have cooked less than 50 percent of the
22 time? And the answer was sometimes yes, sometimes no. Does he
23 follow up and say well what percentage was sometimes, what
24 percentage not? Can you tell us for the record? He never
25 asked the question.

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argument

1 They're asking the Court to do the heavy lifting here,
2 take these declarations -- I have never seen so many
3 declarations by parties trying to fill in gaps in evidence and
4 put it on the Court's desk and say, Court, you fill in our lack
5 of proof because we didn't do our job during discovery.

6 THE COURT: Again, that's as to the percentage of
7 time. I understand you are saying that part is in dispute.

8 MR. NORINSBERG: You can blow out the motion just on
9 that, Judge.

10 THE COURT: I don't understand anything else being in
11 dispute. I don't understand that they weren't the people in
12 charge when they were there and Hernandez wasn't available or
13 wasn't there. That they made discretionary decisions at the
14 time, that they exercised managerial -- they were the people
15 that this record indicates exercised managerial responsibility
16 and supervisory responsibility over everyone else there other
17 than Hernandez, right?

18 MR. NORINSBERG: Fair enough, but another very
19 important factor, critical factor under this Circuit: What's
20 the relative importance of the managerial function that they're
21 performing versus their non-managerial.

22 THE COURT: It is very important, they're the head
23 chef. Everybody is supposed to report to them.

24 MR. NORINSBERG: No, but the fact is on summary
25 judgment the burden is to show -- and here is what the evidence

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argument

1 actually showed -- almost all of the managerial duties that
2 were being performed by the head chef were also being completed
3 by non-exempt employees.

4 THE COURT: Giving me an example of that.

5 MR. NORINSBERG: Such as receiving orders, such as
6 expediting orders.

7 THE COURT: But receiving orders and expediting
8 orders, in and of itself, is not a managerial function. It is
9 the person who is making the discretionary decisions. I don't
10 have anything in this record that says that anyone else was in
11 charge, had the ultimate responsibility for those decisions
12 equal to the head chef. No one else had that. You can't
13 put -- you would agree -- you would agree -- that the
14 managerial responsibilities that the head chefs had, no one
15 else had that same possibility or greater responsibility when
16 they were at their location serving as the head chef.

17 MR. NORINSBERG: I would agree, but what tells this
18 Court that the non-managerial functions that these two
19 plaintiffs reporting were performing was less important. What
20 tells this Court, based on this record, that those managerial
21 functions, in theory, were more important than what they
22 actually did on the frontline every day cooking, training,
23 expediting, receiving orders, just like a whole bunch of
24 non-managerial. What tells this Court on this record? They
25 failed in their proof, they didn't make their burden.

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argument

1 THE COURT: I will look at that. Again, I understand
2 that argument but you keep coming back to the same argument and
3 I have about two minutes, so. I am going to --

4 MR. NORINSBERG: I want to quickly segue.

5 THE COURT: Because the employment decisions -- I will
6 concede to you that they could not -- well, I won't concede
7 that at this point because they argued differently, I have to
8 look at it more carefully -- but, even if I were to concede to
9 you that they didn't, alone, make the hiring and firing
10 decisions, clearly they were the ones in charge of the process.
11 They interviewed the people, they reviewed the applications,
12 they made the decision as to whether or not it would be
13 recommended to the executive chef that a certain person would
14 be hired or a certain person would be fired.

15 That's an accurate statement, right?

16 MR. NORINSBERG: I could say in a very general sense,
17 yes, but let me just point out a few things, quickly.

18 They have absolutely no records -- defendants have no
19 records of any single employee that was ever hired or fired by
20 either plaintiff. Now, there were 50 employees, up to 50
21 employees that were fired from the kitchen in the year 2009
22 alone. There is no records at all to show that our plaintiffs
23 had anything to do with it. The two people that were
24 identified --

25 THE COURT: There is evidence they had something --

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argument

1 you are talking about hiring and firing, or just firing?

2 MR. NORINSBERG: Right now I am just talking about the
3 firing.

4 THE COURT: Didn't they make recommendations as to
5 certain people being fired?

6 MR. NORINSBERG: Yes, and they were disregarded.

7 I am perplexed by counsel's argument. He presents it
8 to you as if it is one side. In reality our plaintiffs
9 vehemently denied it. They said, listen, I did make a
10 recommendation. You know what Hernandez said? Nice. Thanks a
11 lot. I will do what I feel like doing. Thank you. And that's
12 what he did. He didn't listen to these guys.

13 THE COURT: So you say there is nobody who was fired
14 on their recommendation?

15 MR. NORINSBERG: Not one in the record. There is two
16 people they cited, both of them we have direct conflicting
17 evidence. They want this Court to weigh evidence and resolve
18 it on their side because that's the way they want the case to
19 go.

20 THE COURT: But the executive chef didn't hire anyone
21 other than someone that they interviewed, assessed and
22 recommended be hired, right?

23 MR. NORINSBERG: I'm sorry, Judge. I don't think the
24 record supports that at all.

25 THE COURT: I'm asking. You know the record better

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argument

1 than I. The record doesn't support that?

2 MR. NORINSBERG: There is nothing in the record about
3 it. It came up with eight names after discovery is over to try
4 to suggest these people are people that were hired by Tamayo.

5 THE COURT: I'm asking whether that's a disputed issue
6 of fact.

7 MR. NORINSBERG: It is a disputed issue of fact.

8 THE COURT: And how have you disputed the allegation
9 that the people that were hired or interviewed by your clients
10 and were recommended to be hired to the executive chef? What
11 dispute is that? They deny that?

12 MR. NORINSBERG: We have a declaration from Tamayo.
13 We went point by point with three people they claimed he
14 interviewed and recommended.

15 THE COURT: Did they deny, under oath, that they were
16 recommending people to be hired and those people were hired?

17 MR. NORINSBERG: Denied it.

18 THE COURT: Okay. I will look at that.

19 MR. NORINSBERG: Denied it, went point by point.

20 THE COURT: So are you saying they never made a
21 recommendation with regard to hiring or firing that was
22 followed by the head chef?

23 MR. NORINSBERG: I'm not going to say that with
24 Farciert and I think there is very limited testimony, but in a
25 vacuum you have to know how many people overall the restaurant

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argument

1 hired. If 50 people were fired in 2009, logically probably 50
2 people had to be hired. What percentage of that, what part of
3 his role as a manager was that to actually hire people? And
4 that's the problem. Just saying it numerically, he might have
5 been involved with one or two, what does that really tell you
6 as to whether that was an important part of his role in the
7 restaurant.

8 THE COURT: Thank you.

9 MR. NORINSBERG: For these reasons, Judge, summary
10 judgment should not be granted.

11 THE COURT: All right I will have to go back.

12 I will give you 60 seconds because I have a former
13 mayor who is waiting for me downstairs.

14 MR. COHEN: Very quickly on the employment issues.

15 The point by point that he tries to make about the
16 hiring is completely inaccurate. The declaration goes through
17 point by point picking and quibbling about certain points. It
18 does not quibble with the fact that the individuals met with
19 him, he interviewed them, he made a recommendation or didn't
20 and started working before Mr. Hernandez ever saw them in
21 person. A hundred percent undisputed.

22 The same could be said about the terminations. They
23 will quibble about details and say they hoped that he would be
24 fired right away, but if you go carefully through the testimony
25 it is very clear that their recommendation was relied upon, in

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argument

1 one case perhaps not as quickly as they would have preferred
2 but it was relied upon.

3 And then I will just turn very quickly to the
4 percentage issue and there are two things there. The first
5 thing is there is that case law is clear that when, as here,
6 the requirement that the person needs to be there as a manager,
7 they're managing regardless of whether they're supervising the
8 prep, whether they're working the grill at that moment. That's
9 the very nature of being the boss. You are working one thing
10 or you are working the other. And so, under those
11 circumstances there is case law that is very clear that the
12 percentage of time actually performing those functions doesn't
13 matter, but we would go further to say that they were spending
14 the 90 percent if not more of their time performing those
15 functions because it is encompassed in the day-to-day work that
16 they do.

17 And then, finally, I would go back to the first point
18 I made which was if they had an argument to be made that these
19 guys were cooks, that that was their primary duty and not
20 management, I guarantee you they would have put something in a
21 declaration saying I was a cook, or I was somebody who was
22 performing non-exempt functions. In fact, we have listed
23 virtually every function that they performed the great majority
24 of which are management functions and none of them take away
25 from -- and even if some of those are performed by others,

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argument

1 there is only one person who was in charge who was required to
2 supervise and to make sure all of it got done and that was the
3 head chefs.

4 THE COURT: Thank you very much.

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